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No. 93-289

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.,
PETITIONERS

v.

ARLEN SPECTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Respondents do not dispute that the questions presented in this case are of substantial legal and practical importance in the implementation of a major initiative by the political Branches to address numerous and competing concerns involved in closing obsolete military bases throughout the Nation. Rather, relying largely upon the specific—and novel—reasoning of the court of appeals, they argue (Br. in Opp. 1-14) that further review is unwarranted because the court below decided the case correctly. Respondents also contend (*id.* at 14-16) that the decision below is not in conflict with *Cohen* v. *Rice*, 992 F.2d 376 (1st Cir. 1993).

We have previously shown in the certiorari petition, however, that the court of appeals' decision cannot be reconciled with the principles governing judicial review of presidential action set forth by this Court in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992) (see Pet. 11-19), or with principles governing preclusion of judicial review under the Administrative Procedure Act (APA), 5 U.S.C.

701(a)(2) (see Pet. 20-28). Further, as we have explained (Pet. 19-20), the First Circuit's decision in *Cohen* v. *Rice*, *supra*, directly conflicts with the decision below by holding that procedural claims identical to those brought by respondents here are not subject to judicial review.

1. Respondents contend (Br. in Opp. 1-4) that because the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 91-510, 104 Stat. 1808,[1] prescribes procedures for the Secretary of Defense and the Defense Base Closure and Realignment Commission to observe in preparing nonbinding base closure recommendations, it "follows inexorably that judicial review must exist." Br. in Opp. 4. That contention, however, disregards both the "tentative" (*Franklin*, 112 S. Ct. at 2774) nature of the recommendations of those subordinate officials in the base closure process and the APA's requirement of "final agency action" before judicial review may be secured. 5 U.S.C. 704.

To be sure, the Base Closure Act requires the Secretary and the Commission to follow certain procedures in preparing their respective base closure recommendations. See Pet. 3-5. As we have explained (Pet. 12-13), however, the Act vests the final closure decision in the President himself, subject only to congressional disapproval. § 2903(e). The recommendations of the Secretary and the Commission have no legal effect in their own right, and there is no final and binding determination at all until after the President certifies to Congress his approval of the Commission's recommendations. Accordingly, the outcome of the processes prescribed by Congress for the Secretary and the Commission is not one "that will directly affect the parties" (*Franklin*, 112 S. Ct. at 2773), and their tentative and nonbinding actions are thus not

[1] The provisions of the Base Closure Act, as amended, are reprinted at Pet. App. 98a-128a. Citations to section numbers refer to the version of the Act appearing in 10 U.S.C. 2687 note (Supp. IV 1992).

"final agency action" reviewable under the APA. *Id.* at 2774.

Respondents argue (Br. in Opp. 4, 7) that the actions of the Secretary and the Commission are "final" within the meaning of the APA because there is "nothing left for the agencies to do" once they have completed their recommendations. The same observation, however, could have been made regarding the census report of the Secretary of Commerce in *Franklin*: once the Secretary forwarded her report to the President, she had no further responsibilities under the relevant statute. Yet the Court held that forwarding the census report to the President was not "final agency action" reviewable under the APA. And in doing so, the Court made clear that the test for finality turns on "[1] whether the agency has completed its decisionmaking process, *and* [2] whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773 (emphasis added). When both the Secretary and the Commission have completed their decisionmaking processes under the Base Closure Act, the second requirement for finality identified in *Franklin* remains unsatisfied.[2]

[2] Respondents argue (Br. in Opp. 11, 13) that although the Secretary's and the Commission's recommendations are technically nonbinding, the President has only "a limited oversight function" and "*must* rely on the final report of the agencies in making his decision." But that argument ignores the statutory reality that "the President and Congress * * * may reject the Commission's recommendations for any reason at all." Pet. App. 69a. Thus, the President's role in the base closure process can hardly be characterized as the ministerial task of forwarding to Congress legally binding (and therefore final) recommendations of his subordinates. In this case, as in *Franklin*, the agency's recommendations have no effect unless and until the President chooses to approve them and formally to certify that approval to Congress. It is only such action by the President personally that can have any final and binding effect. The inherent "tentative[ness]" (112 S. Ct. at 2774) of the antecedent recommendations renders them nonfinal within the meaning of the APA.

2. *Franklin* also establishes that the action of the President in approving the Commission's report and certifying that approval to Congress does not constitute "final agency action" because the President is not an "agency" within the meaning of the APA. 112 S. Ct. at 2775-2776; see Pet. 13. Echoing the Third Circuit's reasoning, however, respondents argue (Br. in Opp. 7-11) that their claims of procedural noncompliance by the Secretary and the Commission state a constitutional claim of ultra vires presidential action, and that such claims are reviewable outside the confines of the APA.[3]

It is true that where an appropriate cause of action exists, an executive officer may be subject to specific relief if he acts ultra vires his constitutional or statutory authority. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949). Here, of course, *Franklin* forecloses any action based on allegations that the President has exceeded his statutory authority. *Franklin* leaves room only for constitutional claims.[4] Respondents raise only statutory claims, and the claims therefore are barred. The Third Circuit improperly permitted respondents to evade that bar by recharacterizing their claims as ones that the President exceeded his constitutional authority. As we have explained (Pet. 14-16), that rationale, if accepted by this Court, would have the effect of constitutionalizing the entire area of judicial review of agency action.

[3] In the proceedings below, respondents themselves never advanced the theory adopted by the court of appeals and, in fact, disputed its underlying premises. See Pet. 13 n.9.

[4] This Court has left open the question whether the President may ever be subject to injunctive relief—even to require his performance of a ministerial duty. See *Franklin*, 112 S. Ct. at 2776. At the very least, however, federal courts in general have "no jurisdiction * * * to enjoin the President in the performance of his official duties." *Id.* at 2776-2777 (quoting *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866)).

Furthermore, respondents' claims fall far short of meeting this Court's strict requirements for showing ultra vires conduct. This Court distinguishes sharply between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all." *Larson*, 337 U.S. at 691 n.12. Only the latter claims—which typically involve a "depart[ure] from a plain official duty," *Payne* v. *Central Pac. Ry.*, 255 U.S. 228, 238 (1921)—raise the question of ultra vires executive conduct. See Pet. 16-18.

In respondents' view, the procedural claims pressed in this suit reflect "blatant[]" and "brazen" (Br. in Opp. 1, 11) departures from the President's limited statutory authority to close military bases. The record, however, does not support respondents' contention that the President has departed from any plain official duty by accepting the Commission's recommendations in this case. Respondents claim that the Secretary of Defense and the Commission did not observe certain procedural requirements of the Base Closure Act in the course of preparing their nonbinding base closure recommendations. Specifically, they allege that those officials violated the Act (1) by transmitting an incomplete administrative record to the General Accounting Office (GAO) (Pet. App. 6a n.3); and (2) holding non-public meetings (*id.* at 7a n.3).[5] Yet nothing in the Base Closure Act or the circumstances surrounding its enactment indicates that the President is disabled from approving base closure recommendations unless he first determines whether there was any form of procedural

[5] In describing their claims, respondents include (Br. in Opp. 3 n.4) the allegation that the Navy "manipulated the base closure criteria to close the [Philadelphia Naval] Shipyard." In its original decision, however, the court of appeals held that that claim was not subject to judicial review. Pet. App. 56a. Respondents did not seek review of that ruling, and this claim regarding the Philadelphia Naval Shipyard therefore is not properly before this Court.

error in the process.[6] Rather, as the court of appeals recognized, the President "may reject the Commission's recommendations for any reason at all," and "the decision on which bases to close is committed by law to presidential discretion." Pet. App. 46a, 69a. Thus, whatever the merits of respondents' procedural allegations, the President was under no plain official duty to reject recommendations alleged to be infected with procedural error, and he was not without authority to adopt the Commission's recommendations and submit a certificate to that effect to Congress.[7]

[6] Respondents in fact concede (Br. in Opp. 12) that the Act—which effectively requires the President to act on the Commission's report within two weeks of receiving it (§ 2903(e))—does not require the President to ensure that his subordinates have complied with the procedural requirements of the Act. It therefore would be bizarre for a *court* to do so, and to set aside (or enjoin implementation of) the President's decision if it finds that there were procedural errors in that process.

At the same time, respondents err in claiming (Br. in Opp. 5) that the absence of judicial review renders the Act's procedural requirements a nullity. First, executive officers who implement the Base Closure Act are bound to follow the law, regardless whether the courts may enforce that obligation. Second, because the President is directly accountable for the base closure decision, he has a strong incentive to see that the integrity of the process is maintained on an ongoing basis; otherwise, he may be unable to defend his approval of painful base closures as being the result of an independent, bipartisan process. Third, the Act requires the Secretary and the Commission to keep Congress apprised of developments at many steps in the formulation of base closure recommendations. See, *e.g.*, § 2903(a)(1), (b)(2), (c)(1) and (d)(3). Congress therefore also has the opportunity to monitor compliance with the process, and it may consider alleged procedural defects in deciding whether to reject the President's recommendations under the streamlined legislative process prescribed by the Act. See Pet. 5-6. In this case, Congress was fully apprised of respondents' procedural objections to the selection of the Philadelphia Naval Shipyard for closure (see Pet. 6), but it nonetheless chose not to disapprove the President's decision.

[7] Respondents suggest (Br. in Opp. 9 n.12) that this Court has recognized "general" judicial authority to review claims of serious procedural error. That suggestion is unsupported by the cases they cite. In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Natural Gas Act, 15 U.S.C. 717r(b), explicitly authorized judicial review of the order in question. In *Leedom* v. *Kyne*, 358 U.S. 184, 190-191 (1958), the Court found an implied right of judicial review of agency action in excess of delegated power. But in contrast with this case, the agency action in *Leedom* was facially ultra vires; the statute under which the agency had acted conferred specific rights on the plaintiffs; and the statutory scheme did not vest decisionmaking authority directly in the President. *United States ex rel. Kansas City So. Ry.* v. *ICC*, 252 U.S. 178, 187 (1920), a pre-APA decision, stands for the unremarkable proposition that mandamus was available to rectify an agency's "unequivocal refusal to obey" the "direct and express command" of a statute. Here, the Base Closure Act does not direct the President to reject the Commission's recommendations if there is an allegation of procedural error in the process leading up to the Commission's recommendations. Finally, respondents err in citing *Virginian Ry.* v. *Railway Employees*, 300 U.S. 515, 551 (1937), for its dictum that a court may issue a writ of mandamus to require officers to act in a matter over which they have authority; what is more significant, for present purposes, is the Court's further statement that "the court will not assume to control or guide the exercise of the[] [officers'] authority." *Ibid.* In this case, respondents would have the district court control the President's broad discretion to accept or reject the Commission's recommendations.

3. Respondents argue (Br. in Opp. 14-15) that the decision below does not conflict with the First Circuit's decision in *Cohen* v. *Rice*, *supra*. As we have previously shown (Pet. 19-20), however, the plaintiffs in *Cohen*, like respondents here, alleged that the responsible service Secretary failed to supply required information to the GAO and that the Commission held nonpublic meetings in violation of the Act. 992 F.2d at 380. In the face of those virtually identical procedural claims, the First Circuit held that *Franklin* precludes all judicial review. *Id.* at 381-382. That ruling squarely conflicts with the Third Circuit's decision here.

Respondents contend that the conflict between this case and *Cohen* is "artificial and illusory" (Br. in Opp. 14-15) because the First Circuit was not asked to decide the reviewability of constitutional claims against the Presi-

dent. But respondents likewise failed to challenge the President's actions on constitutional (or nonconstitutional) grounds. See Pet. 13 n.9. Yet in contrast with the Third Circuit in this case, the First Circuit in *Cohen* treated the plaintiffs' procedural claims as unreviewable claims of statutory error; it did not circumvent this Court's decision in *Franklin* by sua sponte recasting those allegations as a constitutional claim of ultra vires presidential conduct.[8] Because of the contradictory manner in which the two decisions treat identical claims, further review is warranted to resolve the conflict in authority on this important issue.

4. In addition to the *Franklin* issue, we have also sought review on the question whether the Base Closure Act precludes judicial review within the meaning of the APA, 5 U.S.C. 701(a)(2). As we have explained (Pet. 20-28),

[8] In addition, in *Public Citizen* v. *United States Trade Representative*, No. 93-5212 (D.C. Cir. Sept. 24, 1993), the court of appeals relied on *Franklin* in holding that preparation of the North American Free Trade Agreement (NAFTA) is not subject to judicial review concerning compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4331 *et seq.* Under governing statutes, the Office of the United States Trade Representative (OTR) was responsible for negotiating NAFTA, but the decision whether to submit it to Congress rests with the President. As the D.C. Circuit explained (slip op. 6 (citation omitted)):

> Even though the OTR has completed negotiations on NAFTA, the agreement will have no effect on Public Citizen's members unless and until the President submits it to Congress. Like the reapportionment statute in *Franklin*, the Trade Acts involve the President at the final stage of the process by providing for him to submit to Congress the final legal text of the agreement, a draft of the implementing legislation, and supporting information. The President is not obligated to submit any agreement to Congress, and until he does there is no final action. If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA.

Unlike in this case, even the President's action in *Public Citizen* is not legally binding, because it merely involves the submission of proposed legislation to Congress.

the structure of the Act, its purposes, and its legislative history all strongly support the conclusion that Congress did not intend to subject the final base closure decisions of the President to judicial review.

Aside from respondents' conclusory assertion that the presumption in favor of judicial review has not been rebutted (Br. in Opp. 14), they do not directly controvert the preclusion analysis set forth in the petition. They emphasize (*id.* at 2-4) that the Base Closure Act's procedural requirements are vital to the statutory objective of adopting fair procedures for closing military bases. But that observation is only half the picture. The Act is also designed to vindicate other substantial interests that are incompatible with judicial enforcement of its procedural particulars.[9] Specifically, the Act is designed to expedite the base closure process; to avoid the dangers of political stalemate by establishing an indivisible package of closures that stand or fall together; to leave the final decision concerning base closures in the hands of the President and Congress; and to avoid the protracted procedural litigation over base closures that had doomed prior efforts to close obsolete domestic bases. See Pet. 22-27. Judicial intervention—even if limited to claims of procedural irregularity—would be squarely at odds with those crucial statutory objectives.

For that reason, the fact that Congress imposed procedural requirements on the Secretary and the Commission says nothing about whether Congress intended those requirements to be judicially enforceable. By vesting the base closure decision in a uniquely accountable official, the President, and providing a streamlined legislative process for Congress to consider the President's action, Congress

[9] The Act states that "[t]he purposes of this [statute] is to provide a fair process *that will result in the timely closure and realignment of military installations inside the United States.*" § 2901(b) (emphasis added). Respondents selectively quote the passage referring to "fair process" (Br. in Opp. 1 n.2 (emphasis omitted)), but stop short of quoting the underscored language.

assigned the political Branches direct responsibility for ensuring the integrity of the base closure decision. Claims of procedural irregularity may be fully aired in the political process. See note 6, *supra*. Because the availability of a judicial remedy will jeopardize the Act's policies and timetables and undermine (rather than promote) its procedures—and because the Third Circuit's decision squarely conflicts with that of the First Circuit on an issue on which nationwide uniformity regarding a given base closure package is essential—review by this Court is warranted.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

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